**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MARK VAVERKA** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,011,115 |
| **HY VEE FOOD STORES, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **FIDELITY & GUARANTY INSURANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals from the October 18, 2005 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Respondent was ordered to provide to claimant the corrective surgery as recommended by Lynn D. Ketchum, M.D., after the Administrative Law Judge (ALJ) determined that claimant's injuries to his upper extremities "can be"[1] related to his employment with respondent.

## ISSUE

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Preliminary Decision of the Administrative Law Judge should be affirmed.

Claimant started work for respondent in January 2003 in the dairy department. That job required that claimant handle cases of product weighing up to 32 pounds on a regular and repetitive basis. Claimant testified he stacked crates of milk, orange juice, butter and other products sometimes as high as eight crates high, with the activities being physical and repetitive. Claimant began experiencing physical symptoms shortly after he began

[1] Preliminary Decision (Oct. 18, 2005) at 1.

work for respondent, including tingling in his hands, with night awakening. Claimant sought medical treatment with his family physician, Kimberly Wirths, M.D., on March 27, 2003. At that time, claimant was experiencing tingling in his hands and feet. Claimant had been utilizing Dr. Wirths as his family physician for approximately two years. Claimant had earlier, in 2002, been diagnosed with hypothyroidism and was prescribed medication for the condition by Dr. Wirths. Dr. Wirths ordered claimant to undergo an EMG study, which displayed bilateral carpal tunnel syndrome which was moderate on the right and moderate to severe on the left. Carpal tunnel surgery was recommended.

Dr. Wirths discussed claimant's hypothyroidism, which she testified could possibly be connected to the development of claimant's bilateral carpal tunnel syndrome, although, in her opinion, claimant's hypothyroidism was not severe enough or significant enough to have caused the carpal tunnel condition.

Claimant was referred to Robert L. Coleman, M.D., by respondent's attorney. Dr. Coleman, a hand surgery specialist, examined claimant on September 8, 2003. Dr. Coleman determined that claimant was suffering from bilateral carpal tunnel syndrome, but opined that there was no relation between claimant's employment and the development of this condition. In his October 2, 2003 report, Dr. Coleman noted that claimant began working for respondent on January 6, 2003, as "a courtesy clerk."[2] Dr. Coleman, in that report, went on to note that the job of courtesy clerk did not demand repetitive and vibratory functions generally associated with the development of carpal tunnel syndrome. He also noted that in Dr. Wirths' initial March 27, 2003 entry, claimant indicated he had had the condition for three to four months, which would potentially have preexisted his employment with respondent. The Board notes that Dr. Coleman's history of claimant's employment is inaccurate as it fails to mention claimant's employment in the dairy department when claimant first went to work for respondent. Claimant's transfer to the courtesy help job did not occur until after the carpal tunnel syndrome had been diagnosed. It is evident from this record that the job responsibilities in the dairy department were considerably more physically demanding than those of courtesy help.

Claimant was also referred for an examination to orthopedic surgeon Lanny W. Harris, M.D. This examination, on June 23, 2003, elicited a diagnosis of bilateral carpal tunnel syndrome with the left greater than the right. Dr. Harris noted claimant did a lot of repetitive tasks at work and indicated in his June 23, 2003 report that there were no other activities to have caused this condition. Dr. Harris went on to recommend carpal tunnel releases to resolve the condition.

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[2] Dr. Coleman, in his report dated October 2, 2003, identifies this job as "courtesy clerk." (P.H. Trans., Resp. Ex. A.) Claimant, at his Discovery Deposition, identifies this job as "courtesy help." (Claimant's Discovery Depo. at 5.)

Claimant was then referred by the ALJ for an independent medical examination with board certified plastic surgeon Lynn D. Ketchum, M.D. Dr. Ketchum examined claimant on March 25, 2004. After being provided with an appropriate work history, Dr. Ketchum determined that the diagnosis of bilateral carpal tunnel syndrome more severe on the left than the right was accurate. He also opined that claimant was in need of bilateral carpal tunnel releases and flexor tenosynovectomies of both wrists. He further opined that claimant's condition was, at the very least, aggravated by his employment with respondent. Dr. Ketchum found that claimant's employment with respondent was "the straw that broke the camel's back."[3] He acknowledged that claimant's thyroid problems might be a contributing factor as the carpal tunnel syndrome appeared to develop fairly quickly after claimant began working for respondent. However, he also went on to state that mild to moderate carpal tunnel syndrome can develop in as little as one month, and while moderate to severe carpal tunnel syndrome may take up to a year to develop, it is not unheard of for this type of job to aggravate what could possibly have been an asymptomatic preexisting condition. Dr. Ketchum also recommended the appropriate bilateral surgeries to relieve the conditions.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[4] In this instance, claimant testified that his employment with respondent caused tingling in his hands with night awakening. Claimant denied having difficulties prior to going to work for this respondent. However, claimant's testimony in that regard is somewhat contradictory. During his testimony, he acknowledged that his condition preexisted his examination with Dr. Wirths by three to four months, but also stated that the condition did not become symptomatic until approximately March of 2003, when he first began treatment with Dr. Wirths.

The Board acknowledges that a claimant's testimony alone is sufficient evidence of his or her own physical condition.[5] The Board considers claimant's testimony to be somewhat contradictory, but, when coupled with the medical opinions of Dr. Wirths and Dr. Ketchum, it is sufficiently convincing to allow the Board to determine that claimant's employment with respondent did, at the very least, contribute to his bilateral carpal tunnel syndrome while employed with respondent. An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.[6]

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[3] Ketchum Depo. at 8.

[4] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[6] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971); *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

In this instance, the Board finds that while claimant's condition may not have originated with respondent, at the very least it was aggravated by his employment with respondent. Therefore, claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent and is entitled to the appropriate medical treatment as recommended by Dr. Ketchum. Therefore, the Board affirms the order of the ALJ.

It should be noted that at preliminary hearing, the parties acknowledged that if causation was proven, then both claimant and respondent agree Dr. Ketchum is the proper health care provider to provide the surgery for claimant's conditions.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated October 18, 2005, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of January, 2006.

BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director